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INSIGHT

New COVID-19 Defense Production Act (DPA) Actions: Implementation Considerations

March 1, 2021

The Biden Administration has taken several executive branch actions under the Defense Production Act of 1950 (DPA) to address the Coronavirus Disease 2019 (COVID-19) pandemic. Those actions suggest a revised DPA approach and raise potential implementation issues. This Insight considers those issues and policy considerations for Congress. It is intended as a companion to CRS Insight IN11593. See CRS Report R43767 for a discussion of DPA history and authorities.

Recent DPA Actions

The Biden Administration has issued two executive orders—E.O.s 13987 and 14001—that directly reference the DPA, and other E.O.s with additional potential relevance. On February 5, 2021, White House COVID-19 Supply Chain Coordinator Timothy W. Manning elaborated on three specific DPA actions the Administration was pursuing:

1. Issuing DPA Title I priority-rated orders to support the Pfizer-BioNTech COVID-19 vaccine production and supply chain (Moderna is reportedly already receiving support under Operation Warp Speed);
2. Expanding manufacturing capacity to facilitate production of 61 million rapid point-of-care COVID-19 tests by six suppliers, likely under Title III *expansion of productive capacity* authorities; and
3. Constructing new domestic PPE manufacturing capacity (likely also under Title III), particularly for nitrile gloves, to reduce long-term U.S. dependence on foreign suppliers.

These planned investments are broadly consistent with the Biden Administration's published COVID-19 strategy, and previous CRS analyses of DPA production for COVID-19 countermeasures. The February 5 briefing indicated additional DPA actions in support of the COVID-19 vaccine, PPE, and testing capacity are forthcoming.

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IN11619

Policy and Legal Considerations

The pace and scope of the Biden Administration's recent announcements to broaden the use of DPA for pandemic response raise several policy and legal implementation issues.

DPA Funding and Appropriations

During the February 5 briefing, Manning noted that the Biden Administration's DPA efforts required congressional appropriations. On February 8, the House Financial Services Committee released a draft aid proposal, which included $10 billion in funding to carry out DPA actions. These funds would be appropriated to the Department of Health and Human Services, reserved for COVID-19 health resources, and available to support actions under all DPA authorities. By contrast, previous appropriations had been directed to the DPA Fund, a statutory account available to any agency undertaking Title III projects. Expenditures of DPA Fund appropriations, and discretion over their use, has been a source of dispute between the Department of Defense (DOD) and congressional leadership, with DOD appearing to have asserted priority over Fund allocations as the account custodian under E.O. 13603.

The Financial Services proposal bypasses the DPA Fund. However, providing funding outside of the DPA Fund appropriations line could be interpreted as sidestepping DOD's claims of discretion over DPA Fund monies. Conversely, specific appropriations for Title I and VII activities could be inadvertently taken as a precedent that those DPA actions are expected to draw from designated funds. Generally, non-Title III actions are funded through appropriations to the agency making use of them, and not from DPA-designated funding.

Increasing Domestic Capacity

The Biden Administration's new DPA actions also appear to emphasize reshoring elements of the public health supply chain, and reducing U.S. dependence on foreign imports of certain health and medical supplies. Although global supply chains allow for some economic efficiencies, this system has arguably contributed to domestic health and medical supply shortages during the pandemic and limited the potential for surge production. Given current global supply chain dependencies, ongoing import of certain supplies may be necessary to meet demand.

The DPA is not structured to assist with importing supplies, as its authorities do not appear to reach articles produced abroad. Although it has not been litigated, the Supreme Court has held there is a presumption against extraterritorial application—i.e., when a statute lacks an express indication that Congress intended it to apply outside of the United States, it does not so apply. The DPA's stated statutory purpose is to address national security by "ensur[ing] the vitality of the domestic industrial base," and does not indicate that its authorities are intended to extend outside of the United States. At least one U.S. agency's DPA regulations expressly states that "priority ratings have no legal authority outside of the United States." In other words, even if the President believes that certain critical or scarce resources can be best obtained from abroad, DPA authorities likely cannot be used to procure them.

DPA and Legal Immunity

In some cases, employing DPA authorities may give rise to litigation, particularly if novel uses are involved. Although a company fulfilling an order given priority under Title I may be forced to break an existing contract with a third party, Title VII (50 U.S.C. §4557) denies damages or other relief to the third party plaintiff if the defending company can prove its actions "result[ed] directly or indirectly from compliance with" a DPA order. For example, Title I priority-rated orders in Pfizer-BioNTech's COVID-19

vaccine supply chain may preempt other preexisting contracts, but Pfizer and its suppliers would be legally immune under Title VII.

While it is well settled that this affirmative defense applies to contract disputes, its application to other forms of disputes is not. A company's ability to claim immunity under Title VII in tort (personal injury or harm) cases may be clarified within litigation resulting from the COVID-19 pandemic. For example, in a lawsuit alleging gross negligence against Tyson Foods, Inc. concerning a meat processing facility, Tyson asserted a defense based on E.O. 13917, in which former President Trump directed the Secretary of Agriculture to take action to ensure meat processors continue operations. The federal district court rejected Tyson's argument, although did not address whether Title VII could apply to tort claims. The decision is currently on appeal.

Novel uses of DPA authorities, like E.O. 13917, may make litigation more likely. At the same time, a more comprehensive and sustained use of DPA authorities need not necessarily involve novel applications of the DPA statute.

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